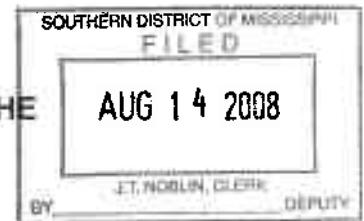


IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION



PAMELA and WILBERT FAIRLEY

PLAINTIFFS

VERSUS

CIVIL ACTION NO. 1:08-cv-374 LG-RHW

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE PROPERTY AND CASUALTY
INSURANCE COMPANY; and
Fictitious Defendants A, B, C, D, E, F and G**

DEFENDANTS

**COMPLAINT
(Jury Trial Requested)**

COME NOW the Plaintiffs, PAMELA and WILBERT FAIRLEY, and files their Complaint against the Defendants, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company (hereinafter jointly referred to as "Nationwide"), and fictitious plead Defendants "A" through "G", for breach of contract, negligence, fraud, gross negligence, bad faith and other causes of action; and would state as follows to wit:

PARTIES

1. The Plaintiffs, PAMELA and WILBERT FAIRLEY, are adult residents of Jackson County, Mississippi.
2. The Defendant, Nationwide Mutual Fire Insurance Company, is a foreign insurance company, with its principal place of business at One Nationwide Plaza, Columbus, Ohio, doing business in the State of Mississippi and which can be served with process by service upon its registered agent for service of process, CT Corporation System of Mississippi, 645 Lakeland East Drive, Suite 101, Flowood, Mississippi, 39232, or upon the Mississippi Insurance Commissioner.

3. The Defendant, Nationwide Mutual Insurance Company, is a foreign insurance company, with its principal place of business at One Nationwide Plaza, Columbus, Ohio, doing business in the State of Mississippi and which can be served with process by service upon its registered agent for service of process, CT Corporation System of Mississippi, 645 Lakeland East Drive, Suite 101, Flowood, Mississippi, 39232, or upon the Mississippi Insurance Commissioner.

4. The Defendant, Nationwide Property and Casualty Insurance Company, is a foreign insurance company, with its principal place of business at One Nationwide Plaza, Columbus, Ohio, doing business in the State of Mississippi and which can be served with process by service upon its registered agent for service of process, CT Corporation System of Mississippi, 645 Lakeland East Drive, Suite 101, Flowood, Mississippi, 39232, or upon the Mississippi Insurance Commissioner.

5. Fictitiously plead Defendants "A" through "G", are individuals, corporations or other entities who caused or contributed to the injuries and damages of the Plaintiffs, but whose true identity and/or liability have not been ascertained at this time. These Defendants may include, but not be limited to, other Nationwide companies, other representatives or employees of the Nationwide agency that sold the subject policy of insurance, and/or other persons and entities, including but not limited to agents, engineers, or adjusters who are affiliated with the Defendants and/or who have acted in concert with Defendants, and who participated in the torts of those Defendants to such a degree as to make them individually liable to the Plaintiffs under Mississippi law, but whose identities and liability are currently unknown. All allegations and claims asserted herein against "Nationwide", "Defendant" and/or "Defendants" are incorporated herein

by reference against Fictitious Defendants "A" through "G". Said Defendants, when their true identities are known and their liability ascertained, will be identified by name and joined in this action, if necessary, pursuant to applicable rules of procedure.

VENUE AND JURISDICTION

6. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1332, as diversity of citizenship exists between the parties and the amount in controversy exceeds \$75,000.00. Venue is proper as the action or events complained of occurred in Jackson County, Mississippi.

FACTS

7. All previous and subsequent paragraphs are incorporated in this section as if fully set forth herein.

8. The Plaintiffs purchased homeowner's insurance policy (Policy Number 6323MP088055) from the Defendants and renewed the subject policy yearly. Said policy was in full force and effect on August 29, 2005. Defendants are in possession of a copy of said policy.

9. Defendants knew or should have known that Plaintiffs, like many other residents on the Mississippi Gulf Coast, purchased said homeowner's insurance policy for protection from direct physical loss from hurricanes as well as other perils.

10. The subject policy was underwritten, marketed, sold, and issued to Plaintiffs by Nationwide Fire, which acted by, through, and/or in conjunction with, its local agent, and/or representatives of its local agent, and/or Nationwide Mutual. In selling the subject policy of insurance to the Plaintiffs, and collecting premiums under the policy, Nationwide, by and through its local agent, expressly and impliedly represented to

Plaintiffs that they would have full and comprehensive coverage for any and all accidental direct physical losses, including those resulting from hurricanes, and including any and all damage proximately, efficiently, and typically caused by hurricanes.

11. Based upon the representations of coverage made by Nationwide Fire and its local agent, and the express and implicit policy coverages, the Plaintiffs reasonably relied upon said representations and purchased the subject policy of insurance from Nationwide Fire, with a reasonable expectation and understanding that Nationwide Fire would pay for all losses proximately and efficiently caused by hurricanes.

12. Nationwide Fire intended for the Plaintiffs to rely upon the representations that they would be afforded insurance coverage for damage caused by hurricanes, and to accept and pay higher premiums based upon that reliance.

13. The Plaintiffs reasonably relied upon said representations and purchased from Nationwide Fire the subject policy of insurance containing the "Hurricane Coverage and Deductible" endorsement, with a reasonable expectation and understanding that Nationwide Fire would pay for all losses proximately and efficiently caused by hurricanes.

14. On or about August 29, 2005, within the subject policy period, the Plaintiffs' home and personal contents therein suffered an accidental direct physical loss from, and were substantially harmed by the windstorm known as Hurricane Katrina. The accidental direct physical loss to the Plaintiffs' dwelling and property triggered all coverages under Plaintiffs contract with Nationwide, in accordance with the terms of the policy and Mississippi law.

15. During the windstorm Hurricane Katrina, hurricane force winds and coastal flooding were separate and not concurrent causes of damage to the insured property. The wind damage that preceded the storm surge did not contribute, sequentially or concurrently, to any loss that may have been caused by storm surge flooding. Hurricane winds that battered the insured property caused catastrophic damage to the Plaintiffs' property before the storm surge arrived.

16. The Plaintiffs properly and promptly reported the total loss of their insured property to Nationwide and filed claims for damages to their home and property caused by Hurricane Katrina.

17. Plaintiffs performed all their duties and obligations with regard to making claims to Nationwide for insurance benefits under both the flood and/or homeowners policies sold by Nationwide.

18. Nationwide had a duty to conduct a thorough investigation of the Plaintiffs' claim. That duty specifically included gathering all relevant facts. Nationwide expressly adopted Mississippi Insurance Department Bulletins 2005-6 and 2006-2 as its own claims procedures, and directed and expected its claims representatives to comply strictly therewith. Mississippi Department Bulletin 2005-6, issued on September 7, 2005 and expressly adopted by Nationwide, mandated that "where there is any doubt [about whether damage was caused by wind or water], that doubt will be resolved in favor of finding coverage on behalf of the insured."

19. Nationwide denied the Plaintiffs' claim under their homeowners' policy, alleging the damage was caused by "water or water-borne material" as defined in the subject insurance policy.

20. In violation of the terms of the policy, Nationwide failed or refused to make payments to the Plaintiffs for Alternative Living Expenses (ALE) Under Coverage Part D. Nationwide knew the Plaintiffs were incurring substantial additional living expenses, however, Nationwide failed to pay any monies toward such expenses.

CAUSES OF ACTION

21. In support of the following claims for relief, Plaintiffs hereby refer to, re-allege, and incorporate by reference, in each of the following causes of action, each of every paragraph of the facts supporting these claims, as set forth above and below.

FAILURE TO CONDUCT A PROPER INVESTIGATION / BREACH OF CONTRACT and DUTY OF GOOD FAITH AND FAIR DEALING

22. Nationwide Fire had a duty under the subject policy of insurance to fully investigate the claims of its insureds such as those arising from Hurricane Katrina, including but not limited to the claims of the Plaintiffs, and to fully compensate the Plaintiffs for covered losses. Nationwide Fire's duties under the subject policy of insurance included, but were not limited to:

- (a) The duty to train adjusters, engineers, and other claims personnel to accurately investigate and determine the causation of losses suffered by Nationwide Fire's insureds, and to correctly apply the subject policy of insurance to the facts of particular losses, including the Plaintiffs, or hire competent, qualified professionals to perform their investigation;

- (b) The duty to have competent adjusters and claims professionals perform a detailed inspection of the Plaintiffs' damages and losses, in a timely and professional manner;
- (c) The duty not to seek out opinions supporting denial of coverage to replace opinions from its claims personnel that supported coverage;
- (d) The duty to acknowledge the true causes of losses resulting from Hurricane Katrina, and/or to fully investigate and consider evidence that showed damages were caused by Hurricane Katrina's devastating winds before any storm surge touched the insureds' properties;
- (e) The duty to complete their investigation, and fully compensate the Plaintiffs for their covered losses, within a reasonable amount of time;
- (f) The duty to fully compensate the Plaintiffs for losses and damages covered under the subject policy of insurance;
- (g) The duty to resolve any and all ambiguities in the subject policy of insurance, and to resolve any and all doubts about the cause of the Plaintiffs' loss in their favor;
- (h) The duty to prove facts supporting, and the applicability of, any exclusion to coverage before excluding coverage for the Plaintiffs' losses caused by Hurricane Katrina;
- (i) The duty to hire an engineer to perform a timely inspection to determine the cause of Plaintiffs' loss before denying coverage for the accidental direct physical losses sustained by Plaintiffs in Hurricane Katrina, a windstorm;

- (j) The duty to accept only opinions from engineers who based their professional opinions on their investigation of known facts, and to not accept engineer reports based on predetermined directives of what their conclusions should be, or coerce engineers in changing and/or altering their reports to coincide with Nationwide's predetermined outcome;
- (k) The duty, implicit within every policy of insurance in the State of Mississippi, to treat the Plaintiffs with good faith and fair dealing; and
- (l) Other duties to be shown at the trial of this matter.

23. Defendants' intentionally and deliberately abandoned their duty to fully, timely and competently investigate the claims of the Plaintiffs, and intentionally and deliberately abandoned their duty to interpret and apply coverage in line with the terms and conditions of the subject policy of insurance, and Mississippi law.

24. The acts and omissions of the Defendants with regard to their "investigation" of the cause of the loss incurred by the Plaintiffs, and Defendant's outright denial of coverage, constitute intentional, deliberate conduct accompanied by fraud or deceit as alleged specifically herein.

25. Nationwide Fire negligently, grossly negligently, maliciously, and/or with reckless disregard for the rights of the Plaintiffs, breached each of the duties outlined above.

26. Additionally, Plaintiffs allege that Defendants ignored evidence that suggested damages and losses suffered by the Plaintiffs were or would have been caused by Hurricane Katrina's winds long before any "water damage" could have

occurred, and failed to interview known eye witnesses of tornados and devastating wind damage in the Plaintiffs general vicinity prior to the arrival of storm surge as part of the investigation of Plaintiffs' claims.

27. The loss the Plaintiffs sustained as a result of Hurricane Katrina was an accidental direct physical loss, caused by windstorm, for which coverage is provided under all parts of the Nationwide Fire policy of insurance, under Mississippi law.

28. As provided by the law in the State of Mississippi, once the Plaintiffs provided to Nationwide Fire evidence of the accidental physical loss, it became Nationwide Fire's burden to prove what part, if any, of the loss was excluded under the terms of the all-risk policy. Nationwide had a duty, under its own policies and procedures, and pursuant to Mississippi law, to resolve all doubts in favor of coverage for its policyholder, the Plaintiffs herein.

29. Nationwide Fire has not and cannot sustain its burden of proof because the Plaintiffs' loss was caused by non-excluded perils, at least in part. Nationwide ignored evidence of Hurricane Katrina's straight-line winds, tornados, severe thunderstorm cells, and air-borne missiles in the neighborhood and vicinity of the Plaintiffs' home. Nationwide abandoned its duty to conduct a full, thorough and timely investigation, and breached its duty to resolve doubts, if any, in favor of the Plaintiffs.

30. Nationwide also had a duty to construe the terms and conditions of the subject policy of insurance in conformance with the clear and unambiguous terms thereof, and in conformance with its representations to the Mississippi Department of Insurance and the Plaintiffs. Nationwide breached these duties by applying its Anti Concurrent Clause (ACC) in a manner contrary to Mississippi public policy and contrary

to its express representations to the Mississippi Department of Insurance made when it was seeking approval to market the subject policy of insurance in Mississippi, contrary to the express terms and conditions of the Hurricane Endorsement sold to the Plaintiffs, contrary to its adoption of Mississippi Insurance Bulletins 2005-6 and 2006-2, and contrary to the express and implied representations to the Plaintiffs.

31. Nationwide is also seeking to deny substantial contractual rights to the Plaintiffs, and other Mississippi insureds, in violation of the clear and unambiguous terms of the subject policy of insurance, and contrary to its duty of good faith and fair dealing.

32. Nationwide is improperly denying the Plaintiffs tens of thousands of dollars of coverage available pursuant to the express terms of Nationwide's homeowners' policy, all to the financial benefit of Nationwide and the extreme detriment of the Plaintiffs.

33. Defendants are liable to the Plaintiffs for failure to conduct a proper and timely investigation, breach of duty of good faith and fair dealing, and breach of contract; and owe the Plaintiffs damages under the terms of the contract of insurance and Mississippi law, together with interest on said amounts for from the date of denial through the date of payment in amount not less than 8% per year.

34. Plaintiffs are seeking the limits of all coverages offered under their policy, as adjusted by the inflation protection and other coverage accelerators and riders contained in the policy, because Plaintiffs sustained a total loss of all property in Hurricane Katrina.

35. Plaintiffs demand payment of the above, plus all other contractual benefits owed to them under the terms of the Nationwide Fire policy.

**BAD FAITH / GROSS NEGLIGENCE /
CONTINUING BREACH OF CONTRACT**

36. The actions of Nationwide in denying the Plaintiffs' claims were part of a fraudulent and deceptive scheme deliberately devised and intentionally implemented by Defendants after Hurricane Katrina, at the expense of the Plaintiffs. Said actions constitute an intentional, wrongful, and tortious act.

37. Defendants intentionally embarked on a corporate course of conduct of fraud and deceit designed to wrongfully deny the Plaintiffs from receiving the benefits to which they were entitled under Nationwide Fire's homeowners' policy(s), as described in the "facts" set forth in the preceding paragraphs. The actions of Defendants were intentional wrongs, and/or were committed with reckless disregard for the rights of the Plaintiffs; and rise to the level of independent torts. Defendants' conduct constitutes the tort of "bad faith", or tortious breach of contract, under Mississippi law.

38. A proper and timely investigation of the Plaintiffs' claim by Nationwide Fire and its agents and/or representatives would have adduced evidence showing that the denial of the claim was without merit.

39. Nationwide Fire negligently, grossly negligently, intentionally, maliciously, and/or with reckless disregard for the rights of its insured, the Plaintiffs, sought to interpret its own policy of insurance contrary to the actual terms and conditions thereof; contrary to Nationwide Fire's express and/or implicit representations that coverage would be provided for losses caused by hurricanes in exchange for additional

consideration; and contrary to Mississippi public policy, all to the benefit of Nationwide and to the detriment of the Plaintiffs.

40. Nationwide, by and through its agents and employees, refused to fully compensate the Plaintiffs for their covered losses caused by Hurricane Katrina, and delayed payments for covered losses for an unreasonable period of time, without a legitimate, arguable, or reasonable basis to do so.

41. Nationwide Fire's breach of its duties under the subject policy of insurance, and the other acts and omissions of Nationwide Fire, as described in the preceding paragraphs, constitute gross negligence, and a bad faith breach of Nationwide Fire's duties and obligations to the Plaintiffs under the subject contract of insurance; as well as a bad faith breach of Nationwide Fire's implicit duty to treat the Plaintiffs with good faith and fair dealing.

42. Nationwide's bad faith conduct is continuing, as Nationwide Fire continues to deny coverage to the Plaintiffs despite clear Mississippi policy, despite the clear and unambiguous terms of its policy (and/or despite the fact that resolution of ambiguous terms must be in favor of coverage for the Plaintiffs), and despite the fact it never obtained evidence to support its denial of the Plaintiffs' claim for losses caused by the accidental direct physical loss that was Hurricane Katrina.

WAIVER AND ESTOPPEL

43. Nationwide Fire had an obligation to establish what, if any, part of the loss fell under the terms of its policy exclusion(s). On information and belief, the only adjuster who inspected the Plaintiffs' property determined the Plaintiffs suffered an

accidental direct physical loss but failed to request an engineer to evaluate the cause of Plaintiffs' loss before Nationwide could deny any portion of the Plaintiffs' claim. Nationwide's Katrina specific requirements prevented the adjuster who inspected the loss from making a coverage decision, and required the retention of an engineer.

44. Ultimately, Nationwide denied the Plaintiffs' claim not because it determined Plaintiffs' home and property were severely damaged by an allegedly excluded peril, but because Nationwide determined it could not find "evidence of wind damage", as part of a claims process adopted by Nationwide after Hurricane Katrina, which process is totally contrary to the terms and conditions of the subject policy of insurance.

45. By essentially declaring its burden of proof irrelevant and intentionally abandoning its obligation to timely establish what, if any, part of the loss was excluded; Nationwide Fire waived its right to exclude any part of the loss. Nationwide's conduct constitutes a waiver of its right to litigate whether portions of the loss are excluded on a case-by-case basis.

DAMAGES

46. As the proximate result of the aforesaid wrongful conduct of Defendants, and each of them, as set forth in all of the preceding paragraphs which are fully incorporated herein, the Plaintiffs have suffered actual damages in the amount of the full contract damages under all coverage parts of the subject policy of homeowners insurance, including actual and reasonable costs of additional living expenses from the time of the Hurricane, August 29, 2005, through a period extending 12 months beyond

the time Nationwide pays the claims of the Plaintiffs it has thus far improperly and in bad faith denied, up to the limits of coverage under the subject policy of insurance.

47. As a further proximate result of Defendants', and each of their, acts and omissions, as set forth above, the Plaintiffs suffered the damages discussed throughout this Complaint, and also including but not limited to loss of insurance premiums, severe mental and emotional distress, anxiety, worry, personal financial expenses, principal and interest expenses incurred on mortgages that were supposed to have been secured through the Nationwide Homeowner's insurance; and other incidental damages all to the Plaintiffs' general damage, all of which were foreseeable to Defendants at the time of, and in the event of the acts and omissions discussed in the preceding paragraphs.

48. As the proximate result of the aforesaid wrongful conduct of Defendants, and each of them, set forth in all of the preceding paragraphs which are fully incorporated herein, the Plaintiffs will also be forced to retain their own engineer and other experts, at considerable expense, to hire attorneys, and to incur substantial time and expense in pursuing this civil action to compel Nationwide to pay the benefits due to the Plaintiffs under the policy. Delay in payment of claims is an integral, and for Defendants, profitable part of the scheme of fraudulent, tortious, and bad faith claims practices giving rise to this suit. Said delay, intended by Defendants, has exacerbated the extra-contractual damages suffered and incurred by the Plaintiffs, for which damages should be awarded in this action.

49. Some or all of the acts and omissions of Defendants, and each of them, described in all of the preceding paragraphs, which are fully incorporated herein, were grossly negligent; and/or were attended by circumstances of misrepresentations of material facts; malice; willful and wanton conduct; and/or were committed with gross,

reckless, and /or callous disregard for the rights of the Plaintiffs. As such, the Plaintiffs are entitled to an award of punitive damages from and against the Defendants, and each of them, in an amount sufficient to punish Defendants, and each of them, for their wrongdoings, and to deter Defendants, and others similarly situated; from committing similar outrageous acts in the future.

50. The acts and omissions of Defendants further justify the imposition of consequential damages and attorneys' fees, in addition to punitive damages.

WHEREFORE PREMISES CONSIDERED, Plaintiffs sue and demand judgment from and against the Defendants, and each of them, jointly and severally, for actual and compensatory damages in the amount of the limits of all damages available under the subject policy of insurance, actual and reasonable additional living expenses from the time of the Hurricane through a period extending 12 months beyond the date Nationwide pays these claims, up to the limits of coverage under the policy; and for extra-contractual damages in an amount sufficient to compensate the Plaintiffs for the anxiety, worry, mental and emotional distress, lost time, mortgage costs and expenses, personal expenses and other incidental and consequential damages they have suffered as a result of Defendants' conduct, plus consequential damages they have suffered as a result of Defendants' conduct, including reasonable attorneys' fees for having to prosecute these claims, and expenses incurred in the prosecution of this claim, plus pre-judgment interest and post-judgment interest in the amount allowed by law, but not less than 10% per annum. Plaintiffs further pray that punitive damages be assessed against each of the Defendants, in an amount sufficient to punish Defendants for their wrongful conduct, and to deter like conduct in the future, and to serve as an example and a warning to others, so as to deter other insurance companies and consultants from

engaging in a similar course of conduct. Plaintiffs further pray for any and all additional relief, in favor of the Plaintiffs, deemed appropriate by this Honorable Court.

Respectfully submitted, this the 8th day of August 2008.

PAMELA and WILBERT FAIRLEY,

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